

Swayne McDonald

LAWYERS

NEWSLETTER

Issue 2
May 2011 – July 2011

Inside this edition

In a Seashell: The Marine and Coastal Area (Takutai Moana) Act 2011	1
Sleeping on the Job	2
Consumer Law Update	3
Copyright (Infringing File Sharing) Amendment Bill	3
Snippets	4
<i>Employment Law Update</i>	4
<i>A King or a Queen – The Law of Succession</i>	4

All information in this newsletter is to the best of the authors' knowledge true and accurate. No liability is assumed by the authors, or publishers, for any losses suffered by any person relying directly or indirectly upon this newsletter. It is recommended that clients should consult a senior representative of the firm before acting upon this information.

In a Seashell: The Marine and Coastal Area (Takutai Moana) Act 2011

On 24 March 2011, the Marine and Coastal Area (Takutai Moana) Act 2011 (the 'Act') was enacted to repeal and replace the Foreshore and Seabed Act 2004.



The call for change has been motivated by an independent Ministerial Review of the Foreshore and Seabed Act 2004, which deemed the 2004 Act unfair, as it failed to recognise the rights of all New Zealanders and was discriminatory against Maori. The new Act is the product of approximately

two years of consultation between the Attorney General, on behalf of the Government, and iwi groups. According to the Attorney General Hon. Christopher Finlayson, the new Act is a "just and durable resolution to the issue, and recognises the rights of all New Zealanders in the common marine and coastal area."

"Marine and coastal area" is defined in section nine of the Act and broadly encapsulates the area that is bounded by the line of mean high-water springs and the outer limits of the territorial sea. It also includes the beds of rivers, airspace, subsoil, bedrock and other matter that are part of the coastal marine area.

The new Act repeals the 2004 Act as it grants courts the jurisdiction to recognise customary rights where such rights can be proven under the Act. However, the granting of a customary title under the Act is distinguished from a private (fee simple) title, as the land comprised under a customary title is subject to public access and cannot be sold.

In summary, the Act:

- applies to the area formerly known as the foreshore and seabed, which will be known in the future as the marine and coastal area,
- creates a common space in the marine and coastal area (the common marine and coastal area) which

allows the interests and rights of all New Zealanders in the marine and coastal area to be recognised in law,

- does not affect existing private titles in the marine and coastal area,
- guarantees and, in some cases, extends existing rights for navigation, ports, fishing and aquaculture,
- provides tests for applicant groups to meet, to demonstrate customary marine title in areas where they have had exclusive use and occupation since 1840 without substantial interruption.
 - This recognition will include the right to go to the High Court (or negotiate an out-of-court settlement with the Crown) to seek customary marine title for areas with which groups such as iwi and hapu have a longstanding and exclusive history of use and occupation.
 - Similar to private (fee simple) title, customary

marine title gives rights to: permit activities requiring a resource consent, some conservation activities, protection of wahi tapu (sacred areas), ownership of taonga tuturu (Maori objects) found in that space, and ownership of non-Crown minerals. It also gives the customary title holder the right to create a planning document setting out objectives and policies for the area.

- Groups such as iwi, hapu and whanau will also be able to gain recognition and protection for longstanding customary rights that continue to be exercised. Their association with the common marine and coastal area in their rohe (home territory of a specific iwi) will also be recognised through a right to participate in conservation processes, which formalises existing best practice in coastal management.

Sleeping on the Job

In *Idea Services (an IHC subsidiary) v Phillip Dickson CA 405/2010*, the Court of Appeal affirmed the decision of the Employment Court that Mr Dickson was working throughout his sleepover and was therefore entitled to the minimum wage for the period of his sleepover.



Mr Dickson worked for Idea Services Limited as a community service worker providing care and support to people with disabilities who live in community homes.

A requirement of his position was that Mr Dickson sleep overnight in the home so that he could deal with any issues that arose during the night and for security purposes. He was paid \$34.00 per sleepover, and \$17.66 per hour for any time during which he was required to be actively working and tending to the needs of the residents. If there were no incidents during the night Mr Dickson would receive \$34.00, which amounted to between \$3.40 and \$4.30 per hour depending on the length of the sleepover.

Mr Dickson claimed that he was entitled to the minimum wage prescribed under the Minimum Wage Act 1983 (the 'Act') for every hour of his sleepover. This claim was upheld at both the Employment Relations Authority and the Employment Court.

The Court of Appeal was required to consider whether sleepovers constitute "work" for the purposes of section six of the Act which states:

"every worker who belongs to a class of workers in respect of whom a minimum rate of wages has been

prescribed under this Act, shall be entitled to receive from his employer payment for his work at not less than that minimum rate."

The Court of Appeal agreed with the Employment Court that three factors must be considered in order to determine whether the sleepover constituted "work":

- the constraints placed on the employee's freedom to do as he or she pleases,
- the nature and extent of responsibilities placed on the employee, and
- that benefit the employer receives from having the employee perform the role.

Mr Dickson had significant restraints placed on him when sleeping over, important responsibilities that he had to attend to with respect to both the home and the residents, and the employer derived a correspondingly significant benefit. The Court of Appeal therefore agreed that in this instance all of these factors applied to a significant degree and therefore Mr Dickson's sleepovers constituted work for the purposes of the Act.

The Court of Appeal rejected Idea Services Limited's alternative argument that the Act was breached only if the employee's average rate of pay over a pay period was less than the prescribed minimum.

This decision will have a great impact on the disability services sector. Ralph Jones, chief executive of Idea Services Limited is quoted as saying this decision would cost the organisation about \$176 million in back payments.

Idea Services Limited have lodged an application for an appeal against the Court of Appeal decision, and the outcome is likely to be newsworthy.

Consumer Law Update

A Consumer Law Reform Bill (the 'Bill') will be introduced to Parliament later this year to update and simplify consumer law. This is in recognition of the fact that the laws covering layby sales, door to door sales, unsolicited goods and services, and the regulations for auctioneers have not been reviewed for some time.



The Ministry of Consumer Affairs (the 'Ministry') released a detailed discussion paper on Consumer Law Reform in June 2010. Extensive consultation has taken place since that time and, together with submissions received, has resulted in five additional papers being produced by the Ministry.

The Bill will reform the Consumer Guarantees Act, the Weights and Measures Act, the Layby Sales Act, the Fair Trading Act, the Door to Door Sales Act, the Auctioneers Act and the Unsolicited Goods and Services Act. Each Act has been reviewed taking into consideration:

- its history, original purpose and ongoing relevance, and
- any gaps in the law, and the effectiveness and overall enforceability of the Act.

It is beyond the scope of this article to describe all of the reforms proposed, however, listed below are some that may be of interest:

- The Fair Trading Act will be amended to update and simplify consumer law related to layby sales, unsolicited goods and services, door to door sales,

and the regulation of auctioneers. It is proposed that infringement notices for minor breaches of the Fair Trading Act will be issued by the Commerce Commission.

- The Consumer Guarantees Act will be amended to require greater disclosure to consumers on express warranties and provide consumers who take up cover under express warranties a statutory cooling off period.
- Changes will be introduced to product safety protections. The Minister will be empowered to issue Government Product Safety Statements that will provide some guidance on acceptable product safety. Notification of product safety recalls will be mandatory and recalls will be published on the Ministry website. Goods that are recalled may be required by the Ministry to be destroyed and a supplier may be asked by the Ministry to stop selling a product if it has been implicated in a serious incident.
- The law related to auctions will be updated. The Consumer Guarantees Act "acceptable quality" provisions will apply to goods sold by auction, online, and to those sold by tender. The Auctioneers Act will be repealed and minimum standards will be set for the registration of auctioneers and the conduct of auctions.
- Unsubstantiated claims will be prohibited under the Fair Trading Act. The Ministry anticipates this measure will assist the Commerce Commission in enforcing the Fair Trading Act as well as assisting consumer confidence and good market conduct.
- The jurisdiction of the Disputes Tribunal will be extended to cover complaints about deceptive and misleading conduct and to provide for the full range of remedies available under the Fair Trading Act.

To keep up to date with the Bill and the proposed changes readers may wish to visit the Ministry website www.consumeraffairs.govt.nz.

Copyright (Infringing File Sharing) Amendment Bill

The internet has totally revolutionised the entertainment industry. Downloading music and movies, also known as file sharing, has become common practice in this day and age. However, it is sometimes easy to forget that behind that one click on the "download" button, lies someone's art, their work and source of income that when downloaded without permission, is in breach of our copyright laws.

The Copyright (Infringing File Sharing) Amendment Bill (the 'Bill') was passed into law by Parliament on 14 April this year. The Bill repeals a section of the Copyright Act 1994 and replaces it with two new sections that specifically deal with illegal peer to peer file sharing.

A review of section 92A of the Copyright Act 1994 concluded that the enforcement measure was ineffective

in its current state and it's repeal and subsequent replacement is intended to offer greater deterrence for illegal file sharing through the implementation of a three-step notice regime. Previous concerns over an ad-hoc approach to the suspension of internet accounts and a lack of judicial oversight have been addressed with the new Bill requiring either the Copyright Tribunal (the 'Tribunal') and/or District Court to assess matters and oversee the formulation of proportionate remedies.

The Three-Step Regime

The Bill provides an overview of the 'Infringing File Sharing' regime and states that the purpose of the amendment is to "provide copyright owners with a special regime for taking enforcement action against people who infringe copyright through file sharing."

The regime itself is based on a notice system where three kinds of infringement notices will be sent to offending account holders before enforcement ensues. The first notice is a detection notice, it is followed by a warning notice, and finally an enforcement notice. The notices are to be issued to the account holder by the Internet Protocol Address Provider (IPAP); which was formerly known as an Internet Service Provider (ISP).



Penalties

If an account holder continues to infringe after receiving all three notices, the copyright owner is able, under the new Bill, to apply to the Tribunal or District Court for relief and enforcement options.

The Bill also permits the Tribunal to award damages against the account holder, the sum of which is to be determined by the Tribunal. The amount ordered can be up to \$15,000, and is to be based on the level of damage or loss sustained by the copyright holder.

Snippets

Employment Law Update

In the case of *Costley v Waimea Nurseries Limited [2011] NZERA Christchurch*, the Employment Relations Authority ('ERA') found that Mr Costley was unjustifiably dismissed for using drugs at work because Waimea did not disclose to Mr Costley information that was relevant in reaching their decision to dismiss him.



It was reported to Waimea's nursery manager, Mr Jameson, that Mr Costley and another employee (Api) may be consuming drugs during their lunch breaks. Mr Jameson met with each employee separately and told them of his suspicions. Api confessed that he and Mr Costley were smoking marijuana at lunch time. Mr Costley was not told about Api's admission or the identity of the person who raised concerns about their suspected drug use.

The ERA found that by not disclosing Api's admission to Mr Costley, Waimea had withheld the piece of information that was most relevant to the decision to dismiss, and that this was a breach of s4(1A)(c) of the Employment Relations Act 2000.

This decision serves as a timely reminder that employers must follow a fair procedure when disciplining or dismissing employees including providing the employee with any relevant information that may be relied on by the employer in reaching their decision.

Alternatively, the copyright holder will be able to apply to the District Court for a suspension of the account holder's internet account. The District Court may, after considering both parties arguments, make a suspension order requiring an IPAP to suspend the internet account of an offender for up to six months. The suspension order is supposed to be reserved for more serious offenders.

Account holders are able to challenge the infringement notices and can request a hearing if they feel they should not be penalised.

ISP Definition Amended

The new amendment has also redefined an internet service provider and the former acronym of an 'ISP' has been replaced with 'IPAP', which stands for Internet Protocol Address Provider. The new definition is a broader one which encapsulates some organisations that are not traditional ISPs such as businesses and universities. The amendment bestows upon such organisations similar responsibilities as a traditional ISP and requires such organisations to send notices to infringers in the same manner as a traditional ISP.

A King or a Queen – The Law of Succession

Following the recent marriage of Prince William and Kate Middleton, the expectation of children in the future raises the question of succession for the future King or Queen of New Zealand.

Succession to the British Throne is passed on by "male-preference primogeniture". The rule has been in place for over 300 years and means male children are preferred



over female children and an older child is preferred over a younger child of the same gender.

The British Government is currently consulting with Commonwealth countries about changing the laws on Royal Succession to enable an older sister to succeed over a younger brother.

Recently our own Prime Minister, Hon. John Key, has said he agrees that the current rules, which could block the succession of a first born daughter of Prince William and Kate Middleton, are "old fashioned". However, because the British Monarch is also head of state of Canada, Australia, nine countries in the Caribbean, three in the South Pacific as well as New Zealand, it would have to be approved by all these countries.

If you have any questions about the newsletter items, please contact us, we are here to help.